

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIEREE T. POWELL,

Defendant-Appellant.

UNPUBLISHED

June 30, 2000

No. 212989

Oakland Circuit Court

LC No. 97-154938-FC

Before: Hoekstra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to mandatory life in prison for the first-degree murder conviction and two years in prison for the felony-firearm conviction. We affirm.

Defendant first contends that the prosecution did not prove premeditation and deliberation beyond a reasonable doubt. We disagree. When reviewing a sufficiency claim, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found the evidence sufficient to prove the essential elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). However, this Court must not interfere with the jury's role of judging the facts and determining the weight and credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 478 (1992). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

To prove first-degree premeditated murder, the prosecutor must establish that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "Premeditation is an essential element of first-degree, premeditated murder." *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998). In *Anderson, supra*, 209 Mich App 537, this Court explained that premeditation and deliberation require sufficient time to allow the defendant to take a "second look." Relevant factors that may be considered to establish premeditation include, but are not limited to: (1) the previous

relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted. *Plummer, supra* at 300.

In the instant case, there was evidence that defendant and the victim, Jerry Fair, got into an argument because Fair was sitting in Terrell Causey's car. Defendant stated, "who are you sittin' in my uncle's car?" Fair responded by asking, "who the hell is you?" Defendant walked away from the argument and toward Laverne Powell's house. Laverne Powell, defendant's aunt, testified that she saw defendant walk into her backyard, stay for a few minutes, and then walk away. Shortly thereafter, she heard gunshots. Laverne Powell acknowledged that defendant kept his gun hidden in her backyard.

Causey testified that he returned to his car after defendant and Fair had their dispute, and that defendant approached the car about seven or eight minutes after Causey returned to the car and asked Causey who Fair was. Causey told defendant Fair's name and turned to point out where Fair lived. When Causey turned back, defendant pulled his gun and shot Fair. Defendant paused for approximately two seconds and then fired four consecutive shots into Fair. Causey yelled at defendant to stop while defendant was shooting Fair. Fair did not make any aggressive moves or do anything to cause defendant to defend himself. Fair put his hands in front of his face when defendant pulled out his gun. One of the shots hit Fair in the arm, which the medical examiner described as consistent with a defense type wound; two of the shots hit Fair's heart and were clearly fatal. Fair was also shot once in the back.

After the killing, defendant stood outside of Willie Mae Thomas' (another of defendant's aunts) door and asked both Thomas and Causey what they were going to say about the shooting. Both Thomas and Causey stated that they told defendant that they would not tell anyone about his roll in the shooting. Defendant returned to Powell's house and said that he had argued with someone and had shot him.

While defendant relies on *Plummer, supra*, we find the case distinguishable. Here, there was evidence that defendant had the time and also the capacity to take a second look. He had time when he took approximately seven to eight minutes to walk over to his aunt's house and back to Causey's car. Strong circumstantial evidence was introduced that defendant went to his aunt's house to retrieve the gun he kept hidden in her backyard. Defendant also had time to take a second look when he paused between shots and when Causey pleaded with him not to shoot the victim. The argument had concluded before defendant departed for the gun, and the argument itself was minor. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have concluded that sufficient evidence was produced to prove that defendant premeditated and deliberated the killing of the victim.

Defendant next contends that several of the prosecutor's remarks in closing argument constituted prosecutorial misconduct. Appellate review of alleged instances of prosecutorial misconduct is precluded if the defendant fails to make a timely objection because the trial court is otherwise deprived of an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Most of the alleged instances of prosecutorial misconduct were not objected to, and most

did not constitute misconduct. After careful review of the allegations of prosecutorial misconduct in light of the entire record, we conclude that the outcome of the trial was not affected. *People v Lukity*, 450 Mich 484, 496; 596 NW2d 607 (1999).

In a supplemental brief, defendant argues that he was denied the effective assistance of counsel by his attorney's failure to object to the prosecutor's misconduct and failure to present an effective diminished capacity defense. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994),

As noted above, most of the alleged instances of prosecutorial misconduct did not constitute misconduct, and if there was misconduct, defendant was not prejudiced because the result of the proceedings would not have been different.

Nor has defendant established an entitlement to relief or to a *Ginther*¹ hearing on his claim of ineffectiveness with respect to a diminished capacity defense. One witness testified that although defendant had been drinking that night, he was not high when he shot Fair. Another witness, Powell, testified that defendant was drunk. Defendant argues that defense counsel should have presented expert testimony on the issue of diminished capacity. However, given the evidence regarding defendant's conduct and statements, we conclude that it was highly unlikely that the jury would have concluded, even in the face of expert testimony on the affects of alcohol, that defendant was intoxicated to the point that he lacked the capacity to premeditate and deliberate.

Defendant's remaining claim of error seems to be predicated on a typographical error, and affords no basis for relief.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Helene N. White

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1972).